

shorter, schedule for compliance. The resulting rules, therefore, should ensure that captioning requirements not threaten the viability of programming networks, and not deter the production of new original programming. As a matter of practical reality, this means that implementation should be more gradual in the initial phases, as existing programming contracts run their course, and should save the more rigorous requirements for the end of the resulting timetable.

Based on this approach, Programmers suggest that the transition period should be longer than suggested in the *Notice*, and more flexible in its requirements. Recognizing the significant costs that will be imposed, and the logistical problems to be overcome, the Commission should implement a 10-year initial implementation period rather than an eight-year phase-in, as tentatively concluded. *Notice* at ¶ 41. Programmers generally agree with the Commission's suggestion of establishing compliance "milestones" within this period. However, because compliance will be more difficult in the initial stage of the schedule, the Commission should avoid a rigid initial obligation. Thus, after three years, the Commission should conduct an inquiry followed by a report to ensure that the industry is on track toward captioning 25 percent of non-exempt programming. Thereafter, the rules would become more formal. 37/

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37/ The *Notice* suggested that 50 percent of non-exempt programming should be captioned after five years, 75 percent after seven years and 100 percent after ten years. *Notice* at ¶ 41. The Commission might consider modifying this time table somewhat to account for the practical reality that initial implementation will be more difficult. Thus, the requirement could be 40 percent after five years, 65 percent after seven years and 100 percent after ten years.

Otherwise, Programmers agree with the Commission's tentative conclusion that the rules should not establish a timetable for captioning of library programming. *Id.* at ¶¶ 57-58. The initial judgment of Congress, as well as the conclusion of the Notice is correct -- imposing any such obligation would impose logistical and economic difficulties that would reduce the amount and variety of programming available to the viewing public.

**D. The Commission Should Adopt Exemptions From The Captioning Requirements That Take Into Account the Particular Economic Situations of the Affected Industries.**

The Commission should pay very close attention to the question of exemptions from the captioning timetable, since Congress expressly included the exemptions to ensure a balanced public interest outcome. This includes both blanket exemptions and exemptions that apply to specific situations. Thus, Section 713(d)(1) provides that the FCC may exempt a class of programming "where the economic burden of captioning these programming types outweighs the benefits to be derived from captioning." *Notice* at ¶ 70. <sup>38/</sup> Section 713(e) requires the Commission to allow exemptions in particular cases, where compliance would cause an undue burden.

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<sup>38/</sup> The House Report on this provision identified several factors to be used in establishing such exemptions, including (but not limited to): (1) the nature and cost of captioning; (2) the impact on operations of the program provider, distributor or owner; (3) the financial resources of the program provider, distributor or owner; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; (7) the existence of alternative means of providing access to the hearing-impaired, such as signing. H.R. REP. No. 204, 104th Cong., 1st Sess. 115 (1995). This interpretation of the provision was adopted by the Conference Report. Conf. Rep. 104-458, 104th Cong., 2d Sess. 183-184 (1996).

These provisions were intended by Congress to be an integral part of the rule, and not a limited exemption.

In this regard, Programmers suggest that the Commission should reconsider its tentative decision not to create any blanket exemptions on the theory that "all classes of providers appear to have the technical ability to deliver closed captioning to viewers intact." *Notice* at ¶ 85. The issue of general exemptions should not be determined by the technical ability of video deliver systems to provide captioning. Nor should it necessarily focus on particular genres of programming. *Id.* at ¶¶ 72-84. Instead, the Commission should consider the issue of blanket exemptions in light of its historic interest in promoting new programming services. In light of the significant costs involved, and the fact that new networks do not break even (on average) until five years after launch, the Commission should exempt any new network from captioning requirements. Consequently, for compliance purposes, an MVPD would not count the programming on a new network toward its captioning obligation until five years after launch. <sup>39/</sup> The factors for blanket exemptions described in the legislative history support this approach, as does the FCC's past approach to programming issues.

The Commission should consider some specific programming types for blanket exemptions, as well. For example, the Commission asked whether certain types of performance, or musical programs should be exempt. *Notice* at ¶ 82. Programmers agree that there is only a marginal value to captioning such programs,

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<sup>39/</sup> As a practical matter, for a network that launched on the effective date of these rules, the compliance timetable set out above would be phased in over a fifteen year period, rather than over ten years.

and the Commission should create an exemption for them in the rules. Additionally, certain programming components, such as “wrap-arounds,” present significant logistical difficulties, and should be exempt. A&E presents four series of programs with “wrap-arounds:” Biography, Movies in Time, History Alive and History Sunday. “Wrap-arounds” provide background information and context about the program subject matter presented by a host or hostess. The “wrap-around” material is produced separately, and would likely be eliminated entirely if it were required to be captioned. Similarly, non-commercial, educational programming, such as Cable in the Classroom, would become economically infeasible if required to be captioned. A&E and The History Channel currently provide one hour of Cable in the Classroom programming daily for the benefit of classroom teachers, who may tape the programs and use them as teaching aids. Other inventive programming that would disappear if subjected to captioning requirements is exemplified by programs like History Showcase and History in the Classroom, both programs on The History Channel. Viewers typically provide historical/educational video segments for these programs. Thus, there is no prospect for captioning at the production stage, and it would be economically infeasible to add captioning post-production.

Finally, the Commission should take a more realistic view toward exemptions for existing programming contracts. The *Notice* acknowledged that it is not typical for programming contracts to “specifically prohibit” the insertion of closed captions. *Id.* at ¶ 87. Accordingly, a rule that exempts only such atypical contracts

does not reflect reality. The Commission should exempt all existing programming contracts that do not affirmatively provide for closed captions.

With respect to individual “hardship” exemptions under Section 713(e), the rules should implement congressional intent that such relief should be available when necessary. Congress defined this term as “significant difficulty or expense,” and set forth the following factors to be included in determining whether compliance with requirements in a particular case would result in an undue economic burden:

- (1) the nature and cost of the closed captions for the programming;
- (2) the impact on the operation of the provider or program owner;
- (3) the financial resources of the provider or program owner; and
- (4) the type of operations of the provider or program owner.

It is important that the Commission acknowledge the differences between the threshold exemption for captioning requirements included in Section 713(d)(1), and the more individualized process described in Section 713(e), even though some of the economic factors to be considered under each section are similar. This provision provides the Commission with more flexibility than does the blanket exemption, and the rules should make clear that such flexibility will be part of the administration of the captioning requirements. For example, the Commission noted that one relevant factor in its administration will be the continuing existence (or not) of government funding. The Commission recognized that much captioning has resulted from this source, and that its continuing availability “may affect the amount of closed captioning that can be

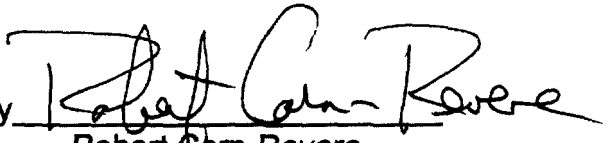
provided.” *Id.* at ¶ 46. Such factors should be considered in assessing “undue burdens.”

### CONCLUSION

Section 713 of the Act contemplates that the Commission will consider the overall implications for the public interest in this proceeding. As it has done in the context of other recent regulatory initiatives, such as cable rate regulation and leased access, the Commission should be guided by economic realities in implementing rules and timetables for closed captioning.

Respectfully submitted,

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